

## HOUSE BILL NO. 438

INTRODUCED BY FORRESTER, GLASER, D. RYAN

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4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE REQUIREMENTS FOR PAYMENTS TO  
5 CONTRACTORS AND SUBCONTRACTORS WITH RESPECT TO CONSTRUCTION CONTRACTS;  
6 REVISING DEFINITIONS; PROVIDING THAT A CONSTRUCTION CONTRACT MAY PROVIDE FOR A  
7 BILLING CYCLE THAT IS OTHER THAN A MONTHLY BILLING CYCLE; PROVIDING THAT CERTAIN  
8 CONSTRUCTION CONTRACT PROVISIONS ARE AGAINST STATE POLICY AND ARE VOID AND  
9 UNENFORCEABLE; ESTABLISHING CONDITIONS UNDER WHICH A CONTRACTOR OR  
10 SUBCONTRACTOR MAY SUSPEND PERFORMANCE OR TERMINATE A CONSTRUCTION CONTRACT;  
11 AMENDING ~~SECTION~~ SECTIONS 28-2-2101 AND 28-2-2103, MCA; AND PROVIDING AN APPLICABILITY  
12 DATE."

13

14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15

16 SECTION 1. SECTION 28-2-2101, MCA, IS AMENDED TO READ:17 **"28-2-2101. Definitions.** As used in this part, unless the context requires otherwise, the following terms  
18 apply:19 (1) "Construction contract" means a written agreement between an owner and a contractor for the  
20 contractor to construct or improve or to provide construction management for the construction or improvement  
21 of an improvement to real property.

22 (2) "Contractor" means a person who has signed a construction contract with an owner.

23 (3) "Government entity" means a city, town, county, consolidated municipal-county government, school  
24 district, or other special district.25 (4) "Improve" means to build, alter, demolish, repair, construct, expand, cover, excavate, grade, fill,  
26 clear, plant, landscape, or furnish material or labor, or both for an improvement.27 (5) "Improvement" means all or a part of a residential or commercial building, structure, area of real  
28 property, quantity of earth or fill material, tree or shrubbery, driveway, roadway, or parking area.29 (6) "Owner" means a governmental entity or private entity that has a legal interest in the real property  
30 improved or to be improved by the performance of the construction contract. An owner may, in the contract,

1 designate another person to represent the owner for the purpose of overseeing the performance of the  
 2 construction contract and in handling administrative tasks respecting the construction contract.

3 ~~(7) "Owner's representative" means an architect, engineer, or other person who represents the owner~~  
 4 ~~and is designated in the contract as the person representing the owner for the purposes of the administration~~  
 5 ~~or oversight of the performance of the construction contract.~~

6 ~~(6)(7) "Receipt" or "receive" means actual receipt.~~

7 ~~(9)(8) "Subcontract" means a contract between a contractor and a subcontractor or between a~~  
 8 ~~subcontractor and another subcontractor, the purpose of which is the performance of all or a part of the~~  
 9 ~~construction contract.~~

10 ~~(10)(9) "Subcontractor" means a person who has contracted with a contractor or another subcontractor~~  
 11 ~~for the purposes of performance of all or a part of a subcontract."~~

12

13 **Section 2.** Section 28-2-2103, MCA, is amended to read:

14 **"28-2-2103. Payment to contractor and subcontractor.** (1) ~~(a) If a contractor performs a construction~~  
 15 ~~contract according to the terms of the contract and requests, either directly to the owner or to owner's~~  
 16 ~~representative, payment for performance of the contract, the owner shall pay the contractor, within 30 days after~~  
 17 ~~receipt by the owner or the owner's representative of the request for payment, for work performed or materials~~  
 18 ~~provided in accordance with the contract. Except as provided in [section 2], each construction contract governed~~  
 19 ~~by this section must define, within the contract, a monthly billing cycle for the contractor to submit monthly~~  
 20 ~~progress payment requests and final payment requests to the owner. The contractor shall submit payment~~  
 21 ~~requests to the owner or the owner's representative. Payment requests must be based upon actual or estimated~~  
 22 ~~work performed and materials supplied during the preceding monthly billing cycle. This requirement does not~~  
 23 ~~preclude an owner from mutually agreeing with the contractor to prepay for materials. The owner or owner's~~  
 24 ~~representative is considered to have received a payment request when the payment request is submitted to any~~  
 25 ~~person designated by the owner or owner's representative IN THE CONTRACT to receive the payment request.~~

26 ~~(b) Except as provided in [section 2], a contractor's request for payment is considered approved by the~~  
 27 ~~owner 21 days after receipt of the request by the owner or the owner's representative OR THE PERSON DESIGNATED~~  
 28 ~~IN THE CONTRACT BY THE OWNER TO RECEIVE THE PAYMENT REQUEST, unless, prior to that time, the owner or the~~  
 29 ~~owner's representative provides the contractor with a written statement containing specific items in the request~~  
 30 ~~for payment that are being disapproved by the owner or the owner's representative.~~

- 1 (c) The owner or the owner's representative may disapprove the request for payment or a portion of the  
2 request based upon a claim of:
- 3 (i) unsatisfactory job progress;  
4 (ii) failure to remedy defective construction work or materials;  
5 (iii) disputed work or materials;  
6 (iv) failure to comply with material provisions of the construction contract or accompanying documents,  
7 including but not limited to payroll certifications, lien releases, warranties, material certifications, and test data;  
8 (v) failure of a contractor to make timely payment for claims, including but not limited to claims for labor,  
9 equipment, materials, subcontracts, taxes, fees, professional services, rent, and royalties;  
10 (vi) damage to the owner; or  
11 (vii) the existence of reasonable evidence that the construction contract cannot be completed for the  
12 unpaid balance of the contract sum.
- 13 (d) An owner or owner's representative may only withhold an amount from a payment that is sufficient  
14 to pay the direct expenses that the owner or the owner's representative may reasonably expect will be necessary  
15 to correct any claim based on the items set out in subsection (1)(c).
- 16 (e) A written statement by an owner or owner's representative must be furnished to the contractor  
17 specifying a condition that is listed in subsection (1)(c) for which approval of the request for payment or a portion  
18 of the request for payment is being withheld. If an owner or the owner's representative disapproves only a portion  
19 of a request for payment, the remainder of the request for payment must be considered approved.
- 20 (f) Except as provided in [section 2], if an owner approves all or a portion of a contractor's request for  
21 payment as provided in subsection (1)(b), the owner shall pay the contractor the approved amount within 7 days  
22 after the contractor's request for payment is approved.
- 23 (g) Upon written request of a subcontractor, an owner or owner's representative shall notify the  
24 subcontractor of any progress payment or final payment made to the contractor within 5 days of issuing payment.  
25 The subcontractor's request for notice remains in effect for the duration of the subcontractor's work on the project  
26 or until the contractor has been fully paid WHO HAS NOT BEEN PAID FOR WORK IN ACCORDANCE WITH THE PROVISIONS  
27 OF SUBSECTION (2), AN OWNER SHALL NOTIFY THE SUBCONTRACTOR OF A PROGRESS PAYMENT OR FINAL PAYMENT MADE  
28 TO THE GENERAL CONTRACTOR.
- 29 (h) Payment is not required under this subsection (1) unless the contractor provides the owner or the  
30 owner's representative with a billing statement or estimate for the work performed or the material supplied in

1 accordance with the terms of the contract.

2 (2) (a) Within ~~3-working~~ 7 days after a contractor receives a periodic or final payment from an owner  
3 or a state agency, the contractor shall pay the subcontractor, if any, the full amount due the subcontractor in  
4 accordance with the subcontract for work performed or materials provided in accordance with that subcontract.

5 (b) Payment is not required under this subsection (2) unless the subcontractor provides the contractor  
6 a billing statement or invoice for work performed or materials supplied pursuant to the terms of the subcontract.

7 (c) Prior to submitting a monthly or final pay application to the owner ~~or the owner's representative~~, the  
8 general contractor may disapprove the subcontractor's request for payment or a portion of the request based  
9 upon a written claim of any of the conditions listed in subsection (1)(c).

10 (3) (a) Within ~~3-working~~ 7 days after a subcontractor receives a periodic or final payment from a  
11 contractor, the subcontractor shall pay another subcontractor, if any, the full amount due the subcontractor under  
12 the subcontract for work performed or materials provided in accordance with that subcontract.

13 (b) Payment is not required under this subsection (3) unless the subcontractor provides the contractor  
14 a billing statement or invoice for work performed or materials supplied pursuant to the terms of the subcontract."

15  
16 **NEW SECTION. Section 3. Alternative billing cycle.** (1) A construction contract may provide for a  
17 billing cycle other than a monthly billing cycle if the construction contract specifically sets forth another billing  
18 cycle and either of the following applies:

19 (a) a notice in substantially the following form, setting forth the other billing cycle, appears in clear and  
20 conspicuous type ~~on each page of the plans, including bid plans and construction plans~~ IN THE "INFORMATION FOR  
21 BIDDERS" SECTION OF THE CONSTRUCTION DOCUMENTS:

22 Notice of Alternate Billing Cycle

23 This contract allows the owner to require the submission of payment requests in billing cycles other than once  
24 a month. Payment requests for this contract must be submitted as follows:

25 \_\_\_\_\_

26 \_\_\_\_\_

27 \_\_\_\_\_; or

28 (b) a notice in substantially the following form, setting forth the other billing cycle, appears in clear and  
29 conspicuous type ~~on each page of the plans, including bid plans and construction plans~~ IN THE "INFORMATION FOR  
30 BIDDERS" SECTION OF THE CONSTRUCTION DOCUMENTS:

1 Notice of Alternate Billing Cycle

2 This contract allows the owner to require the submission of payment requests in billing cycles other than once  
3 a month. A written description of the other billing cycle applicable to the project is available from the owner or  
4 the owner's designated agent at (telephone number or address, or both), and the owner or the owner's  
5 designated agent must provide this written description on request.

6 (2) An owner may change the number of days to approve a contractor's payment request to later than  
7 21 days after the date the payment request is submitted if:

8 (a) the construction contract in a clear and conspicuous manner specifically provides for a later approval  
9 date defined by a specified number of days after the payment request is submitted; and

10 (b) a notice in substantially the following form, setting forth the specified number of days, appears in  
11 clear and conspicuous type ~~on each page of the plans, including bid plans and construction plans~~ IN THE  
12 "INFORMATION FOR BIDDERS" SECTION OF THE CONSTRUCTION DOCUMENTS:

13 Notice of Approval of Payment Request Provision

14 This contract allows the owner to approve the contractor's payment request within \_\_\_ days after it is received  
15 by the owner.

16 (3) An owner may make payments later than 7 days after the date that the contractor's request for  
17 payment is approved if:

18 (a) the construction contract in a clear and conspicuous manner specifically provides for a later payment  
19 defined by a specified number of days after approval; and

20 (b) a notice in substantially the following form, setting forth the specified number of days, appears in  
21 clear and conspicuous type ~~on each page of the plans, including bid plans and construction plans~~ IN THE  
22 "INFORMATION FOR BIDDERS" SECTION OF THE CONSTRUCTION DOCUMENTS:

23 Notice of Extended Payment Provision

24 This contract allows the owner to make payment within \_\_\_ days after approval of the payments.  
25

26 **NEW SECTION. Section 4. Construction contracts -- void provisions.** (1) A provision, covenant,  
27 clause, or understanding that is in, collateral to, or affects a construction contract for a project in this state and  
28 that makes the contract subject to the laws of another state or that requires any litigation, arbitration, or other  
29 dispute resolution proceeding arising from a dispute pertaining to the contract to be conducted in another state  
30 is against the public policy of this state and is void and unenforceable.

1 (2) A provision, covenant, clause, or understanding that is in, collateral to, or affects a construction  
2 contract and that states that a party to the contract may not suspend performance under the contract or terminate  
3 the contract if another party to the contract fails to make prompt payments under the contract as provided in  
4 28-2-2103 is against the public policy of this state and is void and unenforceable.

5  
6 **NEW SECTION. Section 5. Suspension of performance -- termination.** (1) (a) A contractor may  
7 suspend performance under a construction contract for failure by the owner to make timely payment of the  
8 amount approved pursuant to 28-2-2103, and the contractor may terminate the construction contract if the  
9 payment obligations are not satisfied within 30 days of suspension.

10 (b) A contractor shall provide written notice to the owner at least 7 calendar days before the contractor's  
11 intended suspension of performance or contract termination unless a shorter notice period is prescribed in the  
12 construction contract.

13 (c) A contractor may not be considered in breach of a construction contract for suspending performance  
14 or terminating a construction contract pursuant to this subsection (1).

15 (d) A construction contract may not extend the time period for a contractor to suspend performance or  
16 terminate a construction contract under this subsection (1).

17 (2) (a) A subcontractor may suspend performance under a construction contract if the owner fails to  
18 make timely payment of amounts approved pursuant to 28-2-2103 for the subcontractor's work and the  
19 contractor fails to pay the subcontractor for the approved work. The subcontractor may terminate the  
20 construction contract if the payment obligations are not satisfied within 30 days of suspension.

21 (b) A subcontractor shall provide written notice to the contractor and the owner at least 7 calendar days  
22 before the subcontractor's intended suspension of performance or contract termination unless a shorter notice  
23 period is prescribed in the construction contract.

24 (c) A subcontractor may not be considered in breach of a construction contract for suspending  
25 performance or terminating a construction contract pursuant to this subsection (2).

26 (d) A construction contract may not extend the time period for a subcontractor to suspend performance  
27 or terminate a construction contract under this subsection (2).

28 (3) (a) A subcontractor may suspend performance under a construction contract if the owner makes  
29 timely payment of amounts approved pursuant to section 28-2-2103 for the subcontractor's work but the  
30 contractor fails to pay the subcontractor for the approved work. The subcontractor may terminate the

1 construction contract if the payment obligations are not satisfied within 30 days of suspension.

2 (b) A subcontractor may not be considered in breach of a construction contract for suspending  
3 performance or terminating a construction contract pursuant to this subsection (3).

4 (c) A construction contract may not extend the time period for a subcontractor to suspend performance  
5 or terminate a construction contract under this subsection (3).

6 (4) (a) A subcontractor may suspend performance under a construction contract if the owner declines  
7 to approve portions of the contractor's payment request pursuant to 28-2-2103 for the subcontractor's work and  
8 the reasons for the owner's refusal to approve are not the fault of or directly related to the subcontractor's work.  
9 The subcontractor may terminate the construction contract if the payment obligations are not satisfied within 30  
10 days of suspension.

11 (b) A subcontractor may not be considered in breach of a construction contract for suspending  
12 performance or terminating a construction contract pursuant to this subsection (4).

13 (c) A construction contract may not extend the time period for a subcontractor to suspend performance  
14 or terminate a construction contract under this subsection (4).

15 (5) A subcontractor shall provide written notice to the contractor and the owner at least 7 calendar days  
16 before the subcontractor's intended suspension of performance or contract termination unless a shorter notice  
17 period is prescribed in the construction contract between the contractor and subcontractor.

18 (6) A contractor or subcontractor that suspends performance as provided in this section is not required  
19 to furnish further labor, materials, or services until the contractor or subcontractor is paid the amount that was  
20 approved, together with any costs incurred for mobilization and project rescheduling resulting from the shutdown  
21 or restart of a project.

22 (7) Written notice required under this section must be considered to have been provided if either of the  
23 following occurs:

24 (a) the written notice is delivered in person to the individual or a member of the entity or to an officer  
25 of the corporation for which it was intended; or

26 (b) the written notice is delivered at or sent by any means that provides written, third-party verification  
27 of delivery to the last-known business address of the party receiving notice.

28  
29 **NEW SECTION. Section 6. Codification instruction.** [Sections ~~2 through 4~~ **3 THROUGH 5**] are intended  
30 to be codified as an integral part of Title 28, chapter 2, part 21, and the provisions of Title 28, chapter 2, part 21,

1 apply to [sections ~~2 through 4~~ 3 THROUGH 5].

2

3 NEW SECTION. Section 7. Applicability. [This act] applies to construction contracts entered into on  
4 or after October 1, 2003.

5 - END -